ANJUNG HIJAU SDN BHD v. ASSOCIATED BUILDERS & CONTRACTORS SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
FAIZAH JAMALUDIN J
[CIVIL SUIT NO: WA-22C-83-08-2017]
22 APRIL 2024

Abstract – *A contractor must give a written notice to the architect of his intention to apply for an extension of time within 28 days from the architect's instructions, confirmed architect instructions or the commencement of any relevant event. What constitutes a 'relevant event' is defined in cl. 23.8 of the PAM 2006.*

CONSTRUCTION LAW: *Claims – Extensions of time – Main contractor applied for extensions of time ('EOTs') for completion of construction project – Whether EOTs properly applied for by main contractor and approved by architect and contract administrator of project – Whether applications for EOTs in accordance with PAM 2006 – Whether there was conspiracy between parties in approval of applications for EOTs – Whether EOTs null and void – Whether EOTs ought to be set aside*

CONSTRUCTION LAW: *Claims – Payment – Claim by main contractor against developer for balance of payment owing for works done for construction project – Whether claim proven*

TORT: *Conspiracy – Construction claims – Extensions of time ('EOTs') – Main contractor applied for EOTs for completion of construction project – Whether there was conspiracy between parties in approval of applications for EOTs – Whether there was conspiratorial agreement in approval of applications for EOTs in breach of PAM 2006 – Whether purpose of agreement to injure developer – Whether conspiratorial agreement executed resulted in damages to developer*

The suit between the plaintiff and the defendants related to the construction of a project. The plaintiff was the developer of the project. The first defendant was the main contractor appointed by the plaintiff while the second defendant was the architect and contract administrator of the project. The third defendant was a professional architect and also the director and shareholder of the second defendant. The civil and structural engineer for the project was Perunding ZNA (Asia) Sdn Bhd ('ZNA'). The plaintiff's claim against the defendants was in connection with three extensions of time ('EOTs') granted by the second defendant to the first defendant in respect of Phase 1 and Phase 2 of the project. The original completion date for Phase 1 of the project was 12 September 2014. On 10 September 2014, the first defendant applied to the second defendant for an EOT for 230 days to complete the construction work of Phase 1, listing Engineering Instructions No. 1 ('EI No. 1') and No. 2 ('EI No. 2') from ZNA as the reasons for

applying for the EOT. The second defendant issued EOT1 on 13 April 2015 for 100 days only. Dissatisfied with the extension of time granted under EOT1, the first defendant appealed. EOT3 was granted by the second defendant pursuant to the appeal made by the first defendant against EOT1. With respect to Phase 2 of the project, ZNA instructed the first defendant to conduct additional work of 128 numbers of Mackintosh Probe Test at designated locations at Phase 2 of the project. The first defendant applied to the second defendant for a 95-day EOT, and the second defendant granted EOT2 for a period of 36 days ('EOT2'). In this suit, the plaintiff contended that all three EOTs were null and void and should be set aside and as the EOTs were null and void, the plaintiff did not owe the first defendant the balance of payment for the works done by the first defendant for the project. The defendants denied the plaintiff's claim and pleaded that the first defendant's applications for the EOTs were in accordance with the PAM 2006 and the second defendant had properly and validly approved the first defendant's application for the EOTs in accordance with the PAM 2006. The first defendant counterclaimed against the plaintiff the sum of RM3,141,706.82 being the balance of the payment owing by the plaintiff to the first defendant for works done for the project. The issues that arose were: (i) whether the EOTs were properly applied for by the first defendant and approved by the second defendant in accordance with the PAM 2006; (ii) whether the second and/or third defendants conspired with the first defendant to approve the first defendant's applications for the EOTs; (iii) whether the plaintiff was entitled to RM3,198,102 being damages for LAD; and (iv) whether the plaintiff owed the first defendant the sum of RM3,141,706.82 being balance of payment for works done by the first defendant for the project.

Held (dismissing plaintiff's claim; allowing defendants' counterclaim):

(1) Clause 23.1(a) of the PAM 2006 stated that the contractor must give the architect written notice of its intention to apply for the EOT within 28 days of 'from the date of AI, CAI or the commencement of the relevant event, whichever is earlier'. 'AI' and 'CAI' are defined in cl. 2.2 of the PAM 2006 as 'Architect's Instructions' and 'Confirmation of Architect's Instructions', respectively. As expressly provided in cl. 23.1(a) of the PAM 2006, the written notice for an application for an EOT can be given not just within 28 days of an AI and CAI but also within 28 days from the commencement of a 'relevant event'. In this instant case, there was no dispute that the instructions for the works under EI No. 1 and EI No. 2 were 'relevant events' under cl. 23.8 of the PAM 2006. The plaintiff's expert witness ('PW2'), as a consultant architect, was specially skilled in architecture and the requirements of the PAM 2006. However, as he failed to read the initial application for EOT1, which was the very document the court must form an opinion on whether it was a 'written notice' under cl. 23.1(a) of the PAM 2006,

PW2's opinion that the first defendant failed to submit the written notice to the second defendant, in compliance with cl. 23.1(a) of the PAM 2006, was not a relevant fact that could be considered by the court in making its findings. The first defendant had submitted a written notice to the second defendant of its intention to apply for EOT1 within 28 days of the commencement of a relevant event and had accordingly complied with the condition precedent in cl. 23.1 of the PAM 2006. The plaintiff did not adduce any evidence to discharge its burden of proof that the first defendant had failed to comply with the condition precedent in making its application for EOT1. It also failed to adduce any evidence to prove that the second defendant had granted the EOTs without justification and/or in breach of the PAM 2006. The first defendant had applied for the EOTs in accordance with the PAM 2006 and the second defendant had granted the EOTs in accordance with the PAM 2006. (paras 37-39, 56-57, 111 & 112)

(2) Pursuant to the principles of the tort of conspiracy, in order to prove that the second and/or the third defendants had conspired with the first defendant and ZNA, the plaintiff must prove the following: (i) there was a conspiratorial agreement between the defendants and ZNA for the second defendant to approve the first defendant's applications for the EOTs in breach of the PAM 2006; (ii) the purpose of the agreement was to injure the plaintiff; and (iii) the agreement was executed by the defendant and ZNA which resulted in damages to the plaintiff. Despite making the very serious allegation of conspiracy against the defendants and ZNA, the plaintiff did not adduce any evidence at all to prove the requisite elements of the tort of conspiracy. Accordingly, the plaintiff failed to prove its allegation of the tort of conspiracy between the defendants and ZNA for the second defendant to grant the EOTs to the first defendant without justification and/or in breach of the PAM 2006. (paras 114, 116 & 117)

(3) The plaintiff must prove the loss it claimed. The plaintiff, however, did not plead any particulars in its amended statement of claim as to how the amount of RM3,198,102 of LAD was calculated. In addition, it did not produce any evidence to prove the amount of LAD that it claimed to have paid as a result of the issuance of EOT1 and EOT3. Therefore, the plaintiff failed to discharge its burden of proof regarding its claim of the sum of RM3,198,102. Accordingly, the plaintiff was not entitled to the sum of RM3,198,102 claimed. (paras 121, 124, 126, 127 & 128)

(4) The employer must pay the contractor for the construction works under a contract between them. The evidence showed that the plaintiff had not paid the first defendant the amount certified in the COIPP No. 22 and it had not paid all the sums certified under some of the earlier COIPPs. The first defendant had successfully discharged its burden of proof that

A the plaintiff owed it the sum of RM3,141,706.82 being the balance of payment for the construction works done by the first defendant for the project. (paras 135, 137 & 140)

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors And Another Case [1995] 3 CLJ 639 CA ***(refd)***

Bonham Carter v. Hyde Park Hotel 64 TLR 177 ***(refd)***

Brown v. Dunn [1893] 6R 67, HL ***(refd)***

Ermiadi v. PP [2023] CLJU 56; [2023] 1 LNS 56 CA ***(refd)***

Hong Yik Trading v. Liziz Plantation Sdn Bhd [2017] 8 CLJ 491 FC ***(refd)***

International Times & Ors v. Leong Ho Yuen [1980] CLJU 31; [1980] 1 LNS 31 FC ***(refd)***

Junaidi Berimang v. PP & Another Appeal [2022] CLJU 522; [2022] 1 LNS 522 CA ***(refd)***

Kulasingam Samuel v. Rasammah JV Tambipillai [1997] 1 CLJ 406 CA ***(refd)***

London Underground Ltd v. Citylink Telecommunications Ltd [2007] All ER (D) 318 ***(refd)***

SCK Group Bhd & Anor v. Sunny Liew Siew Pang & Anor [2010] 9 CLJ 389 CA ***(refd)***

Shamim Reza Abdul Samad v. PP [2009] 6 CLJ 93 FC ***(refd)***

Tan Kim Ho & Anor v. PP [2009] 3 CLJ 236 FC ***(refd)***

Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1995] 1 CLJ 15 FC ***(refd)***

Temloc Ltd v. Errill Properties Ltd 39 BLR 30 ***(refd)***

The Government Of Malaysia & Anor v. Aminah Ahmad [2023] 8 CLJ 1 FC ***(refd)***

YL Pavillion Sdn Bhd v. Capitol Avenue Development Sdn Bhd [2018] MLRHU 905 ***(dist)***

Wong Swee Chin v. PP [1980] CLJU 138; [1980] 1 LNS 138 FC ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 45, 101, 102, 103

Other source(s) referred to:

Robert J Gemell, *Quantification of Delay and Disruption in Construction and Engineering Projects,* 2017, Thomson Reuters, p 338

Sundra Rajoo & Harbans Singh, *Construction Law in Malaysia 2013,* Thomson Reuters, pp 276 & 277

For the plaintiff - Ashvin Kulasingam; M/s Donny Wong & Co

For the 1st defendant - Norazali Nordin & Mohamad Nizam Mohamed Salleh; M/s Maxwell Kenion Cowdy & Jones

For the 2nd & 3rd defendants - Andrew Heng Yeng Hoe & Roger Leong Chun Lim; M/s Zain Megat & Murad

Reported by Lina E

JUDGMENT

Faizah Jamaludin J:

Introduction

[1] This suit between the plaintiff and the defendants relate to the construction of a project in Ipoh, Perak, known as:

Cadangan Pembangunan Kediaman Fasa 1 yang mengandungi 16 unit rumah berkembar 2 ½ tingkat, 7 unit sesebuah Zero Lot 2 ½ tingkat dan 24 unit rumah berkelompok 2 ½ tingkat di atas sebahagian Lot 15517S (PN283716) Bandaraya Ipoh, Daerah Kinta, Perak Darul Ridzuan untuk Tetuan Anjung Hijau Sdn Bhd dan Cadangan Pembangunan Kediaman Fasa 2 yang mengandungi 17 unit rumah sesebuah Zero Lot 2 ½ tingkat di atas sebahagian Lot 15517s (PN283716), Bandaraya Ipoh, Daerah Kinta, Perak Darul Ridzuan untuk Tetuan Anjung Hijau Sdn Bhd ("the Project").

[2] The plaintiff is the developer of the project. The first defendant ("D1") was the main contractor appointed by the plaintiff for the construction of the project. The second defendant ("D2") was the architect and contract administrator of the project. The third defendant ("D3") is a professional architect: he is a director and a shareholder of D2. Perunding ZNA (Asia) Sdn Bhd ("ZNA") was the civil and structural engineer for the project.

[3] The plaintiff's claim against the defendants is in connection with three extensions of time (referred to individually as "EOT1", "EOT2" and "EOT3", and collectively as "EOTs") granted by D2 to D1 in respect of Phase 1 and Phase 2 of the project.

[4] D1's counterclaim against the plaintiff is for the balance of the payment owing by the plaintiff to D1 for work done for the project.

[5] EOT1 and EOT3 were extensions of time for Phase 1 of the project granted by D2 to D1, where: (i) EOT1 was granted by D2 pursuant to the initial application for EOT1 and the revised application for EOT1 (both defined below) made by D1 to D2; and (ii) EOT3 was granted by D2 pursuant to an appeal made by D1 against EOT1. EOT2 was an extension of time for Phase 2 of the project granted by D2 to D1.

[6] The plaintiff contends that all three EOTs were null and void and should be set aside. It further contends that because the EOTs were null and void, the plaintiff does not owe D1 the balance of payment for the work done by D1 for the project.

[7] The plaintiff seeks the following reliefs against the defendants: (i) a declaration that the EOTs given by D2 to D1 are null and void and be set aside; (ii) a declaration that D1's claims against the plaintiff are null and void; and (iii) damages in the sum of RM3,198,102 being liquidated and ascertained damages, together with interest at rate of 5% per annum from 13 November 2014 until full settlement.

[8] The defendants deny the plaintiff's claim. They plead that D1's applications for the EOT1, EOT2 and EOT3 were in accordance with the PAM 2006 and that D2 had properly and validly approved D1's application for the EOTs in accordance with the PAM 2006.

[9] D1 counterclaims from the plaintiff the sum of RM3,141,706.82 being the balance of payment due and owing from the plaintiff to D1 for work done for the project together with interest of 7.85% per annum on the sum from 1 November 2018 until full settlement.

[10] Trial proceedings of this suit took place over 11 non-consecutive days. The parties called ten witnesses: there were eight witnesses of fact and two expert witnesses. The witnesses are:

Name	No.
Azrin Mirzhan bin Kamaludin	"PW1"
Ar Ng Yen Shiuun (Plaintiff's Expert Witness)	"PW2"
Dr Tong Ling Siew	"DW1"
Azhar bin Abu Bakar	"DW2"
Ong Ee Boon	"DW3"
Suriati Ab Razak	"DW4"
Long Ah Yew @ Long Shee Yeow (AY Long)	"DW5"
Zulkiphlee Bin Abu Bakar	"DW6"
Ahmad Jaafar bin Azizul Rahman (D3)	"DW7"
Ar Steven Thang Boon An (D2 and D3's expert witness)	"DW8"

[11] Upon considering the terms of the PAM 2006, the law and the evidence adduced during the trial, this court found that the plaintiff had failed to prove its case on a balance of probabilities against any of the defendants. The plaintiff's claim against the defendants was accordingly dismissed.

[12] As regards D1's counterclaim, this court found that D1 had proved that the plaintiff owes D1 the balance sum of RM3,141,706.62 for work done by D1 in respect of the project. Judgment was accordingly given to D1 for its counterclaim against the plaintiff.

[13] The full reasons for this court's decision are set out in this judgment.

Material Facts

[14] The plaintiff appointed D1 as the project contractor by a letter of award dated 6 December 2013 ("letter of award"). Their contract was governed by the terms and conditions in the PAM Contract 2006 (without quantities) standard form contract ("the PAM 2006").

[15] The project was developed in two phases: Phase 1 and Phase 2. D1 had completed the construction of the project.

[16] Phase 1 of the project was certified as complete on 8 April 2015: the certificate of practical completion ("CPC") for Phase 1 was issued by D2 on 27 April 2015. Phase 2 of the project was certified as complete on 1 October 2015: the CPC for Phase 2 was issued by D2 on 11 October 2015.

[17] On 26 April 2018, ZNA issued its first engineering instruction to D1 – Engineering Instructions No. 1 ("EI No.1"), instructing D1 to divert the project's drainage system next to the Royal Perak Golf Club.

[18] On 29 April 2018, ZNA issued a second engineering instruction to D1 – Engineering Instruction No. 2 ("EI No. 2"). In EI No. 2, ZNA instructed D1 to lower and reconstruct the main drainage system along the project's boundary with Politeknik Ungku Omar ("PUO").

[19] Both EI No. 1 and EI No. 2 were signed by Zulkiphlee bin Abu Bakar ("DW6"), the principal of ZNA. DW6 testified during the trial that the main outlet drain adjacent to PUO had to be reconstructed by lowering down further and enlarging the existing drain. The existing drain had caused a backflow of water onto PUO's land during heavy rain. ZNA issued EI No. 2 after PUO had complained to Majlis Bandaraya Ipoh about the flooding on its land resulting from the backflow of water.

EOT1

[20] The original completion date for Phase 1 of the project was 12 September 2014.

[21] On 10 September 2014, D1 applied to D2 for an EOT of 230 days to complete the construction work of Phase 1 ("initial application for EOT1"). D1 listed EI No. 1 and EI No. 2 from ZNA as the reasons for applying for the EOT. With the application, D1 attached the reasons for the application, EI No. 1 and EI No. 2, the request for instructions ("RFI") and other documents.

[22] Subsequently, in a letter to D2 dated 6 November 2014, D1 requested a meeting between D1 and the plaintiff together with consultants, namely, D2, ZNA, Primedge Consult, and the quantity surveyor, Messrs Basar & Harun Sdn Bhd ("the QS"). The purpose of the meeting was to finalise D1's application for EOT1.

[23] The meeting was held on 11 November 2014. It was attended by D1, the plaintiff, D2, ZNA, Primedge Consult, and the QS. Following the meeting, D1 submitted its revised application for EOT1 ("revised application for EOT1") on 13 November 2014.

[24] The revised application for EOT1 was for similar reasons as that for the initial application for EOT1 but with an additional 203 days applied for the construction of a sewerage treatment plant ("STP"). This was because the

works for the construction of the STP could not commence until the reconstruction of the drain along the boundary with PUO was completed – the drain had to be lowered before the site could be handed over to the nominated sub-contractor (M/s Belkron Trading Sdn Bhd) ("Belkron") for the construction of the STP. Belkon started constructing the STP on 13 October 2014 and took 203 days to complete the STP on 5 May 2015.

[25] D2 issued EOT1 on 13 April 2015. Despite D1 having applied for an extension of time for a period of 433 days in its revised application for EOT1, D2 granted D1 an extension of time of 100 days only from 12 September 2014 to 20 December 2014 for the completion of Phase 1 of the project in EOT1. Dissatisfied with the extension of time granted under EOT1, D1 in its letter dated 26 May 2015 to D2, appealed for the extension of time for the completion of Phase 1 of the project to be extended to 5 May 2015 *ie*, the completion date of the work on the STP by Belkron. The appeal letter was copied to ZNA and the plaintiff.

[26] Phase 1 of the project was certified as practically completed by the CPC on 8 April 2015. D1 appealed to D2 against the 100 days granted under EOT1 through its letter to D2 dated 26 May 2015. D2 granted EOT3 for 205 days on 3 August 2015.

[27] With respect to Phase 2 of the project, ZNA through Engineer's Instruction No. 1 dated 24 January 2014 ("EI No. 1 for Phase 2") instructed D1 to conduct additional work of 128 numbers of Mackintosh Probe Test at designated locations at Phase 2 of the project per the sketch attached to the said engineer's instruction.

[28] On 10 February 2015, D1 applied from D2 for a 95-day extension of time ("application for EOT2").

[29] D2 granted EOT2 for a period of 36 days to extend the completion date of Phase 2 to 20 March 2015.

Issues To Be Tried

[30] The parties had filed a long list of issues to be tried prior to the trial. These issues fall into the following four broad categories:

(i) were EOT1, EOT2 and EOT3 properly applied for by D1 and approved by D2 in accordance with the PAM 2006?

(ii) did D2 and/or D3 conspire with D1 to approve D1's applications for the EOTs?

(iii) is the plaintiff entitled to RM3,198,102 being damages for LAD? and

(iv) does the plaintiff owe D1 the sum of RM3,141,706.82 being balance of payment for work done by D1 for the project?

Issue (i): Were EOT1, EOT2 And EOT3 Properly Applied For By D1 And Approved By D2 In Accordance With The PAM 2006?

Did D1, In Making The Application For EOT1, Comply With The Condition Precedent In Cl. 23.1(a) Of The PAM 2006?

[31] The plaintiff's case is that D1, in applying for the EOT1, did not comply with the condition precedent in cl. 23.1(a) of the PAM 2006.

[32] What is the condition precedent in cl. 23.1(a) of the PAM 2006? It is the written notice that a contractor must give to the architect of his intention to apply for an EOT within 28 days from the date of an architect's instructions ("AI"), confirmed architect instructions ("CAI") or the commencement of any relevant event (defined in cl. 23.8 of the PAM 2006). Clause 23.1(a) expressly states that giving such written notice within the requisite 28 days is a condition precedent of applying for an EOT. Clauses 23.1(a) and (b) of the PAM 2006 reads:

> **23.0 Extension of Time**
>
> 23.1 If the Contractor is of the opinion that the completion of the Works is or will be delayed beyond the Completion Date **by any of the Relevant Events stated in Cl. 23.8,** he may apply for an EOT provided always that:
>
> 23.1(a) the Contractor shall give written notice to the Architect his intention to claim for such EOT together with an initial estimate of the EOT he may require supported with all particulars of the cause of delay. Such notice must be given within 28 Days from the date of AI, CAI or the commencement of the Relevant Event, whichever is earlier. **The giving of such written notice shall be a condition precedent to an entitlement of EOT;** and
>
> 23.1(b) within 28 Days of the end of the cause of delay, the Contractors shall send the Architect his final claim of EOT duly supported with all particulars to enable the Architect to assess any EOT to be granted. If the Contractors fails to submit such particulars within the stated time (or within such longer period as may be agreed in writing by the Architect), it shall be deemed that the Contractor has assessed that such Relevant event will not delay the completion of the Works beyond the Completion Date. (emphasis added)

[33] The plaintiff's case is that D1 did not give written notice to D2 of its intention to apply for an extension of time within 28 days of the commencement of a relevant event; hence, it argues that D2 and D3 cannot exercise its discretion to grant EOT1 to D1.

[34] The plaintiff's claim is premised on the opinion of its expert witness, Ar Ng Yean Shiunn ("PW2"), who, in preparing his expert report, did not read the initial application for EOT1 submitted by D1 to D2.

[35] Mr Ashvin Kulasingam, the counsel for the plaintiff, submitted that based on the opinion of the plaintiff's expert witness, EOT1 should be dismissed *in limine* because of this purported lack of written notice by D1.

[36] Mr Ashvin also submitted that the engineering instructions (EI No. 1 and EI No. 2) are not recognised under the PAM 2006 as a reason for the grant of the EOTs, unless it was endorsed by an AI.

[37] With respect to learned counsel for the plaintiff, cl. 23.1(a) of the PAM 2006 states that the contractor must give the architect written notice of its intention to apply for the extension of time within 28 days of "from the date of AI, CAI or the commencement of the relevant event, whichever is earlier". "AI" and "CAI" are defined in cl. 2.2 of the PAM 2006 as "architect's instructions" and "confirmation of architect's instructions", respectively.

[38] As expressly provided in cl. 23.1(a) of the PAM 2006, the written notice for an application for an EOT, can be given not just within 28 days of an AI or CAI but also within 28 days from the commencement of a "relevant event".

[39] In this instant case, there is no dispute that the instructions for the works under EI No. 1 and EI No. 2 are "relevant events" under cl. 23.8 of the PAM 2006.

[40] DW7 testified that both engineering instructions were "relevant events" under cls. 23.8(f), (m) and (s) of the PAM 2006. The plaintiff's counsel did not challenge his testimony under cross-examination.

[41] It is a trite principle of law that failure to cross-examine a witness on a particular area of his evidence is deemed to be acceptance of that part of his evidence: see *Brown v. Dunn* [1893] 6 R 67, HL; *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors And Another Case* [1995] 3 CLJ 639; [1995] 3 AMR 2375; [1995] 2 MLJ 770, CA; *Shamim Reza Abdul Samad v. PP* [2009] 6 CLJ 93, [2011] 1 MLJ 471; [2010] 2 AMR 293. FC; *Tan Kim Ho & Anor v. PP* [2009] 3 CLJ 236; [2009] 3 MLJ 151, FC; *Ermiadi v. PP* [2023] CLJU 56; [2023] 1 LNS 56, [2023] 4 AMR 697; [2023] MLJU 51. CA.

[42] Furthermore, the plaintiff's own expert witness, PW2, in cl. 2.5.5 of his expert report dated 5 November 2018 stated that the drainage works at the Royal Perak Golf Club (under EI No. 1) and the drainage works along the boundary with PUO and the construction works for the STP (under EI No. 2) were pr*ima facie* "relevant events" under cls. 23.8(e), (h) and (s) of the PAM 2006.

[43] Accordingly, this court finds no merits to the submission by plaintiff's counsel that an EI is an unauthorised instruction that cannot form part of the "relevant event" under cl. 23.8 of the PAM 2006.

[44] It is an undisputed fact that D1 had submitted to D2 on 10 September 2014, a written notice of its application for EOT1 of 230 days (defined above as the "initial application for EOT1") after having received EI No. 1 and EI No. 2 on 26 August 2014 and 29 August 2014 respectively, from ZNA. A

[45] The initial application for EOT1 was submitted within 28 days of the commencement of the relevant events *ie*, EI No. 1 and EI No. 2. It is also undisputed that all of D1's written notices to D2 for EOT1, EOT2, and EOT3 form part of the bundle of documents in the ikatan dokumen bersama filed in this court for the purposes of the trial of this suit. B

[46] However, the plaintiff's expert, PW2, in preparing his report, did not read D1's initial application for EOT1, even though the plaintiff gave him the ikatan pliding and the ikatan dokumen bersama for purposes of his assessment and preparation of his expert report. C

[47] PW2, in his report, stated that he had no knowledge of the initial application for EOT1 that D1 had submitted to D2. PW2 said the document was not made available to him for his assessment. PW2 referred to the initial application for EOT1 as "EOT0". In para. 2.4.8 of his report, PW2 stated, "EOT0 is nowhere to be found on official records that was made available for my assessment and therefore one could not verify the authenticity of its existence." D E

[48] With respect to PW2, the authenticity of initial application for EOT1 (or EOT0 as PW2 calls it in his expert report) was never challenged by the plaintiff and was adduced as a Part B document during the trial.

[49] Under cross-examination by D2 and D3's counsel, Mr Andrew Heng, PW2, admitted that he did not read all the documents in the ikatan dokumen bersama when making his assessment and preparing his expert report. The plaintiff's counsel did not re-examine him on this point. F

[50] Moreover, the plaintiff's own witness, PW1, admitted that the initial application for EOT1 was made by D1 on 10 September 2014. He also admitted that D1 had copied its application to the plaintiff. G

[51] In addition, DW1, in his witness statement, stated that D1 had applied for the EOT through its initial application for EOT1 dated 10 September 2014 to D2. And DW6 of ZNA testified that ZNA was copied the initial application for EOT1. H

[52] The plaintiff's counsel did not challenge either DW1's or DW6's testimonies in relation to D1's submission of the initial application for EOT1 during cross-examination. Accordingly, the plaintiff is deemed to have accepted their evidence that D1 did submit a written notice for EOT1 to D2.

[53] Under s. 45 of the Evidence Act 1950, where the court has to form an opinion upon "a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions", the opinion of experts I

ie, the person who is "specially skilled in that foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions, are relevant facts.

[54] It is settled law that notwithstanding the opinion given by an expert witness, the court is free to draw its own conclusions based on the evidence adduced during a trial. The Court of Appeal in *Kulasingam Samuel v. Rasammah JV Tambipillai* [1997] 1 CLJ 406, [1997] 1 MLJ 288, [1997] 1 AMR 797 said:

> Expert witnesses only give opinion evidence but the Court is free to draw its own conclusions.

[55] In this instant case, this court must form an opinion as to whether the Initial Application for EOT 1 sent by D1 to D2 was a "written notice" under cl. 23.1(a) of the PAM 2006. The plaintiff's expert witness, PW2, as a consultant architect, is specially skilled in architecture and the requirements of the PAM 2006.

[56] But as he had failed to read the initial application for EOT1, which is the very document this court must form an opinion on whether it is a "written notice" under cl. 23.1(a) of the PAM 2006, PW2's opinion that D1 had failed to submit the written notice to D2 in compliance with cl. 23.1(a) of the PAM 2006, is a not relevant fact that can be considered by this court in making its findings. As is evident from PW2's expert report, his opinion that the initial application for EOT 1 is not a "written notice" under cl. 23.1(a) of the PAM 2006 is premised on his failure to read the document.

[57] Accordingly, based on these facts, this court finds that D1 submitted a written notice to D2 of its intention to apply for EOT1 within 28 days of the commencement of a relevant event and had accordingly complied with the condition precedent in cl. 23.1(a) of the PAM 2006.

Was EOT3 Granted By D2 In Compliance With Cl. 23.10 Of The PAM 2006?

[58] The plaintiff contends that EOT3 was not granted by D2 in compliance with cl. 23.10 of the PAM 2006 for the following reasons:

(i) EOT3 was not granted by D2 within 12 weeks from the CPC;

(ii) D1 did not come with clean hands in applying for the EOT3 because it did not serve the required written notice for EOT1 under cl. 23.1(a);

(iii) EOT3, which is the result of D1's appeal against EOT 1, was based on the same grounds as EOT1; and

(iv) D2 and D3 did not attend the meeting on 1 June 2005 between D1 and ZNA.

Is An Architect Obliged Under Cl. 23.10 Of The PAM 2006 To Review And Fix A Completion Date Within 12 Weeks After The Date Of CPC?

[59] Phase 1 of the project was certified by D2 as practically completed by the issuance of the CPC on 8 April 2015. D1 made its appeal to D2 against the 100 days granted under EOT1 through its letter to D2 dated 26 May 2015 ("application for EOT3"). D2 granted EOT3 for 205 days on 3 August 2015.

[60] Under clause 23.10 of the PAM 2006, D2, as the architect of the project, may, but is not obliged to, within 12 weeks from the date of the CPC to review and fix a completion date, which is later than that previously fixed if in D2's opinion the fixing of the completion date is fair and reasonable having regard to any of the relevant events.

[61] Clause 23.10 expressly states that an architect "may (but not obliged to)" within 12 weeks of the practical completion review and fix a later completion date. Clause 23.10 of the PAM 2006 reads:

> 23.10 *The Architect may (but not obliged to) within twelve (12) weeks after the date of Practical Completion* review and fix a Completion Date later than that previously fixed, *if in his opinion the fixing of such later Completion Date is fair and reasonable having regard to any of the Relevant Events, whether upon reviewing a previous decision or otherwise and whether or not a Relevant Event has been specifically notified by the Contractor under Clause 23.1.* No such final review of extension of time shall result in a decrease in any extension of time already granted by the Architect. In the event the fixing of such later Completion Date affects the amount of Liquidated Damages the Employer is entitled to retain, he shall repay any surplus amount to the Contractor within the Period of Honouring Certificates.
>
> (emphasis added)

[62] The Court of Appeal in *Junaidi Berimang v. PP & Another Appeal* [2022] CLJU 522; [2022] 1 LNS 522; [2022] MLJU 453, held that the word "may" conveys "consideration" or "discretion". The Federal Court in *The Government Of Malaysia & Anor v. Aminah Ahmad* [2023] 8 CLJ 1; [2023] 5 MLJ 32; [2023] 6 AMR 102; [2023] 5 MLJ 32 held that the word "may" is merely permissive and does not impose any obligation to act.

[63] Therefore, under cl. 23.10 of the PAM 2006, D2 may review and fix a later completion date than it had previously fixed within 12 weeks of the CPC. Hence, in this instant case, the fact that D2 had granted EOT3 and fixed a later completion date than it had earlier fixed under EOT1, more than 12 weeks after the CPC, does not mean that EOT3 granted by D2 was in non-compliance of cl. 23.10 of the PAM 2006.

[64] D2 and D3's expert witness, AR. Steven Thang Boon Ann ("DW8") is a consultant architect with experience in exercising cl. 23.10 of the PAM 2006. DW8 stated in his expert report that the period of 12 weeks for the architect to "review and fix a completion date later than previously fixed"

in cl. 23.10 is a provision allowed in a standard form contract. DW8 stated that depending on the size and complexity of the works, the period could be shortened or lengthened. He referred this court to the handbook for the PAM Contract 2006, cl. 23.10, p. 186, published by Pertubuhan Akitek Malaysia (PAM) in 2010, which reads:

> Clause 23.10: The Architect may (but not obliged) within twelve (12) Weeks after the date of Practical Completion review and fix a Completion Date later than that previously fixed …
>
> *This Clause allows the Architect to review extension of time, previously granted, within 12 weeks after the issuance of the Certificate of Practical Completion.* As the earlier grant of an extension of time under clause 23.4 is an interim extension of time, the Architect should take this opportunity to review his earlier decision in light of actual events. It is not mandatory that the Architect must review the extension of time previously granted, but it is recommended that if the Architect is not reviewing the extension of time, he shall confirm this to the Contractor, so that the Contractor knows what the Architect has decided. *The period of 12 weeks is the provision allowed in a standard form of contract. Depending on the size and complexity of the Works, the period could be shortened or lengthened.*
>
> In *Temloc v. Errill Properties* 39 BLR 30, the court, in deciding a JCT Contract Clause 25.3.3: "After completion Date, … the Architect may, and not later than the expiry of 12 weeks after the date of Practical Completion … Fix a Completion later than that previously fixed …" decided that:
>
> > In my view, … Clause 25.3.3 … Is directory only as to time and is not something which would invalidate the calculation and payment of liquidated damages ... (emphasis added)

[65] The case of *Temloc Ltd v. Errill Properties Ltd* 39 BLR 30, [1988] 1 WLUK 627, referred to by the PAM in the handbook for the PAM Contract 2006, is an English Court of Appeal case. The standard form contract governing the contract between the developer and contractor in that case was the 1980 JCT standard form of building contract private with quantities edition ("JCT Contract"). Clause 25.3.3 of the JTC Contract, unlike cl. 23.10 of the PAM 2006, states:

> Not later than the expiry of 12 week from the date of practical completion the architect **shall** in writing to the contractor either … fix a completion date later than that previously fixed. (emphasis added)

[66] Even though cl. 25.3.3. of the JTC Contract states that the architect shall fix the date of practical completion not later than 12 weeks from the date of practical completion, the English Court of Appeal held that the 12 weeks period stated in cl. 25.3.3 of the JTC Contract is "directory only as to time and is not something which would invalidate the calculation and payment of liquidated damages."

[67] In contrast to the cl. 25.3.3 of the JTC Contract, cl. 23.10 of the PAM 2006 expressly states that the architect "may (but not obliged to)" within 12 weeks after the date of practical completion review and fix a completion date later than that previously fixed.

[68] In his expert report, DW8 concluded that EOT3 was validly granted for the following reasons:

(i) the grounds stated in D1's application for EO 3 fell within the relevant events under cl. 23.8 of the PAM 2006, particularly cls. 23.(b), (m) and (p). DW8 stated:

> Of significant is the complaint by Politeknik Ungku Omar to Majlis Bandaraya Ipoh dated 3rd September 2013 on the back flow of rain water from the newly constructed drainage system. This drainage system was redesigned by ZNA and was constructed by Defendant 1, thus pushing back the site possession to the NSC for Sewer Treatment Plant to commence their work. …

(ii) ZNA, as the consultant civil and structural engineer of the project, is responsible for the structural and civil work on site. Therefore, it was appropriate for ZNA to evaluate the EOT for the civil and structural work submitted by D1 and make the recommendations to D2, who is, as the consultant architect, is the contract administrator of the project;

(iii) D1 submitted EOT1 on 10 September 2014, and D2 issued a letter dated 28 September 2014, seeking more information from D1 to substantiate its EOT claims. DW8 said:

> As the work on site especially the Sewer Treatment Plant remains outstanding, detailed account would not be reasonable until almost completion.

(iv) the 12 weeks in cl. 23.10 can be shortened or lengthened depending on the size and complexity of the work.

[69] The plaintiff's counsel never challenged DW8's findings in his expert report during cross-examination. It follows, therefore, based on the rule in *Brown v. Dunn*, that the plaintiff is deemed to have accepted DW8's findings that EOT3 was validly granted.

[70] Accordingly, based on the interpretation of the word "may" by the Court of Appeal in *Junaidi Berimang* and the Federal Court in *Aminah Ahmad* (which, pursuant to the doctrine of *stare decisis*, this court is bound) and the views expressed by the English Court of Appeal in *Temloc Ltd v. Errill Properties Ltd*, by PAM in the *Handbook for PAM Contract 2006*, and by the DW8 in his expert report, I find that it is not mandatory under cl. 23.10 PAM 2006 for D2 to grant EOT3 and fix a later completion date, within 12 weeks of the CPC.

A **Did D1 Not Come With Clean Hands In Applying For EOT3?**

[71] The other argument raised by the plaintiff's counsel to support its contention that EOT3 was not granted in accordance with cl. 23.10 of the PAM 2006 was that D1 did not come with clean hands in submitting the application for EOT No. 3. This argument is premised on the plaintiff's
B allegation that D1 did not serve D2 the requisite written notice for EOT1 under cl. 23.1(a) of the PAM 2006.

[72] For reasons discussed above, this court found that D1 did serve the written notice of its application for EOT1 within 28 days of the
C commencement of the relevant events under cl. 23.1(a) of the PAM 2006.

[73] Accordingly, as D1 did served the written notice on D2 and had met the condition precedent under cl. 23.1(a) of the PAM 2006 in relation to its application for EOT1, this court finds that D1 did come with clean hands in submitting its application for EOT3.

D **[74]** Moreover, an architect's review of his previous decision as to the completion date under cl. 23.10 of the PAM 2006, is not dependent on whether or not the contractor gave notice under cl. 23.1 of the PAM 2006. Sundra Rajoo, WSW Davidson and Harbans Singh, in their book *The PAM 2006 Standard Form of Building Contracts*, LexisNexis, 2010, at p. 484 state:

E

> Clause 23.10 requires the architect to review the completion date in any event; and he must do this in the light of any Relevant Event *whether or not specifically notified to him by the contractor under Clause 23.1, so long as he is of the opinion that the review and the fixing of such later Completion Date is fair and reasonable having regard to any of the Relevant Events that have impacted on*
F *the progress of Works. Prima facie,* he must take into account all the possible Relevant Events for which the contractor is contractually entitled to an extension of time even for which the contractor has failed to give written notice, a condition precedent to any extension of time entitlement, or failed to submit sufficient particulars. (emphasis added)

G **[75]** Therefore, D2's grant of EOT3 upon his review of the previous extension of time granted under EO1 under cl. 23.10 of the PAM 2006 is not invalidated even if D1 did not give a written notice under cl. 23.1.

Must D1's Appeal In EOT3 Be On Different Grounds From That In Its Application For EOT1?

H **[76]** As for the plaintiff's argument that the grant of EOT3 was invalid because the grounds of D1's appeal in EOT3 are the same as its application for EOT1, this court is unable to find any merit in the argument for the following reasons:

I (i) first, cl. 23.10 of the PAM 2006 does not state that the architect's review of the previously fixed completion date must be based on new grounds or facts. Similarly, there is nothing in the *PAM's Handbook for the PAM*

Contract 2006 that states that an architect, in reviewing and fixing a completion date that he had previously fixed, must base such review on new facts;

(ii) secondly, D1 did provide further documents to ZNA on 16 June 2015 to support its application for EOT3.

D1 had a meeting with ZNA on or about 1 June 2015, and on 16 June 2015, D1 forwarded the documents to D2 to support its application for EOT3. The supporting documents included a written explanation, photographs and site plans to support its appeal against EOT1 (see bundle B1/pp. 117 to 127).

In these further documents, D1 showed ZNA and D2 that the drainage work at PUO cannot be carried out concurrently with the STP and that the NSC (Belkron) can only start building the STP after the drain along the border with PUO had been lowered and reconstructed.

[77] Learned counsel for the plaintiff cited the case of *YL Pavillion Sdn Bhd v. Capitol Avenue Development Sdn Bhd* [2018] MLRHU 905, a decision of the High Court of Kota Kinabalu, to support its argument. The counsel for the plaintiff, in his submissions, referred to and quoted a portion of the judgment, where the learned judge had listed out the argument put forward by the plaintiff's counsel. It was not the decision of the findings of the court. I am puzzled why counsel for the plaintiff chose to represent to this court the submissions of counsel in *YL Pavillion* as the findings of the court in that case.

[78] Moreover, the facts in *YL Pavillion* differ from and can be distinguished from the facts of this case. In *YL Pavillion*, the architect had issued an architect's certificate granting an extension of time for the contractor to complete the works. The developer (the defendant) then used the architect's certificate to unilaterally revise the contractual date for delivery of vacant possession to the purchaser (the plaintiff). In contrast to this present case, the plaintiff in *YL Pavillion* did not challenge the validity of the extension of time granted by the architect in the architect's certificate to the contractor. In that case, the plaintiff challenged the developer's action in wrongfully revising the date of delivery of vacant possession and reducing the amount of liquidated damages paid. The High Court of Kota Kinabalu held that it was unlawful for the developer to unilaterally revise the date of delivery of vacant possession.

Is EOT3 Null And Void Because D2 And D3 Did Not Attend The Meeting On 1 June 2015 Between D1 And ZNA In Respect Of D1's Application For EOT3?

[79] D1's application for EOT3 is premised on the event relating to civil and structural works, namely the reconstruction and lowering of the PUO drain and the construction of the STP. Therefore, it is imperative for D2, as the project architect, to consider ZNA's recommendations before deciding on whether or not to grant EOT3.

[80] D1 in the written explanation to D2 stated that the lowering of the main outlet drain adjacent to PUO was critical to the construction of the STP because the work for the construction of the STP cannot start until the drain had been lowered.

[81] DW6 of ZNA said that after reading the supporting documents submitted by D1 as regards its appeal against the number of days granted in EOT1, ZNA was of the view that D1 had presented a valid case to support its claim for the appeal on the 100 days granted for EOT1.

[82] During the trial, DW6 testified that based on the ground, the site condition, the key plan that was presented to ZNA, where the drain was located, and where the STP was located, ZNA concluded that the drain by PUO and the STP could not be constructed at the same time. D1 had to lower the drain first before the STP could be constructed.

[83] ZNA, in a letter dated 31 July 2015 (signed by DW6) to D2, recommended that D2 grant a further EOT of the completion date from 13 October 2014 to 5 May 2015, *ie*, 205 days. ZNA informed D2 that it believed D1's claim for the EOT (*ie*, the lowering down of the drain and the handover of the STP site) was reasonable and that D1 should be granted an EOT from 13 October 2014 to 5 May 2015. The body of ZNA's letter reads:

> We had a lengthy discussion with ABC [D1] and received substantial documents on the above issue on which the ABC has presented a valid case in supporting their claim for an appeal on the EOT phase 1 application. One of the main factors, was the need to lower down the drain because of ponding on the adjacent lot and was further crippled by the requirement to divert the existing earth drain, which was flowing directly on the STP designated location.
>
> Based on site representative report, on 1st September 2014 the STP site was *backfilled and work has finished 90% and almost ready for handing over. Therefore we believe the ABC's claim for EOT phase 1 on the lowering down drain and STP site handing over on 13th October 2014 were reasonable and we believe the ABC should be granted the EOT period which have claimed.* However, PZNA should be bound to any delay or complication regarding this matter as Instruction was issued within reasonable time.
>
> As such we recommend the EOT for the STP from 13th October 2014 to 5th May 2015 or 205 days which they have applied. (emphasis added)

[84] Accordingly, for all these reasons, this court is unable to agree with counsel for the plaintiff that EOT3 is null and void because D2 and D3 did not attend the meeting between D1 and ZNA on 1 June 2015.

Was D2's Grant Of EOT3 "Fair And Reasonable" In The Circumstances?

[85] Under cl. 23.10 of the PAM 2006, D2 (as the project's architect) must act "fairly and reasonably" when considering D1's appeal in its application for EOT3.

[86] In their book *The PAM 2006 Standard Form of Building Contracts,* LexisNexis, 2010, Sundra Rajoo, WSW Davidson and Harbans Singh state at pp. 482 to 483:

> Clause 23.10 is an example of such a provision which affords the architect an opportunity to undertake such a review purportedly to correct any "unreasonableness" … it gives the architect another opportunity to revisit, address his previous decisions and to rectify areas that particularly need another look … In short, it gives a second chance to make a final decision on extensions of time.

[87] And on p. 484, they state an architect is required to review the completion date in light of any relevant event under cl. 23.10 "so long as he is of the opinion that the review and the fixing of such later completion date is fair and reasonable having regard to any of the relevant events that have impacted on the progress of works". They go on to state at p. 485:

> Hence, at the end of the said review process [under clause 23.10], the architect can make one of the following two decisions:
>
> (1) confirm a completion date previously fixed; and
>
> (2) fix a completion date later than that previously fixed.

[88] In *London Underground Ltd v. Citylink Telecommunications Ltd* [2007] All ER (D) 318; [2007] EWHC 1749 (TCC), the English Technology and Construction Court (TCC) had the occasion to consider the architect's obligation (or the arbitrator empowered to review a contractor's application for an extension of time) to "grant an interim extension of time as is fair and reasonable in the circumstances".

[89] The TCC held that the assessment of what is "fair and reasonable" extension of time in circumstances is one which (i) necessarily has a subjective element, (ii) is based on the assessment of the circumstances, (iii) analysis of critical delay should not be seen as determining the answer to the question, and (iv) analysis of critical delay is at most an area of expert evidence which may assist the arbitrator or the court in arriving at the answer of what is a fair and reasonable extension of time in the circumstances. Ramsey J said:

> 164. … The question of what is fair and reasonable in the circumstances indicates that the remedy is not tied to a particular analysis nor is the arbitrator bound to follow the contentions of the parties. The assessment is one which necessarily has a subjective element and is based on an assessment of the circumstances.
>
> 165. …, whilst analysis of critical delay by one of a number of well-known methods is often relied on and can assist in arriving at a conclusion of what is fair and reasonable, that analysis should not be seen as determining the answer to the question. It is at most an area of expert

A evidence which may assist the arbitrator or the court in arriving at the answer of what is a fair and reasonable extension of time in the circumstances. …

[90] What is delay and critical delay? Robert J Gemell, in *Quantification of Delay and Disruption in Construction and Engineering Projects*, 2017, B Thomson Reuters, p. 338, explained the difference between delay and critical delay as follows:

> A delay analysis is an investigation into the cause and extent of project delay. There are critical delays and non-critical delays. Critical delay causes delay to the project completion date. Non-critical delay does not C cause delay to the project completion date.

[91] "Fair and reasonable" assessment of extension of time by an architect is explained in *Keating on Building Contracts*, 11th edn, 2021, by Stephen Furst and Vivian Ramsey, Thomson Reuters at p. 261, para. 8-025 as follows:

D

> In *John Barker Construction Ltd. v. London Portman Hotel Ltd.* (1996) 83 B.L.R.31 it was held that an architect, when considering what a "fair and reasonable" extension of time would consist of Cl. 25 of the JCT 1980 Standard Form of Building Contract with Quantities must: (i) *apply any relevant provisions of building contract, (ii) make a logical and methodical analysis* E *of the effect any relevant events had or were likely to have on the programme, and (iii) conduct a calculation of the relevant critical delay, rather than simply make an impressionistic general assessment of the same.* Although the need for a logical and methodical analysis to underpin any award of an extension of time has been doubted (see *Royal Brompton Hospital NHS Trust v. Hammond (No. 7)* 76 Con. L.R. 148 at 176) it is submitted that arbitrators and courts F are likely to require contract administrators to discharge this function in a way that contains some form of logical and methodical assessment although this may not necessitate a critical path analysis by way of a computer programme. (emphasis added)

[92] Therefore, D2, in reviewing the extension of time that it previously G given in EOT1 for purposes of D1's appeal, must (i) apply the relevant provisions in cl. 23.10 of the PAM 2006; (ii) make a logical and methodical analysis of the effect of any relevant event or likely to have on the programme, and (iii) conduct a calculation of the relevant critical delay.

[93] Ahmad Jaafar bin Azizul Rahman ("DW7"), who is D3 and the H director and shareholder of D2, stated in his witness statement (QA6):

> After assessing ZNA's recommendation and satisfied that the delaying event comes within the meaning of Relevant Event under Clauses 23.8(f), 23.8(m), 23.8(s) and the application was made within 28 days from the commencement of the Relevant Event, *ie*, 10.09.2018, we proceeded to I grant a Certificate of EOT No. 01 for the extension of completion date until 20.12.2014, *ie*, 100 days, *vide* a letter dated 13.04.2015, which can be found at CBOD-C page 233.

[94] Under cross-examination by plaintiff's counsel as to DW7's answer to QA6 in his witness statement, DW7 said that D2, after consulting with ZNA and making its own assessment, recommended to the plaintiff to grant the EOT of 100 days to D1.

[95] Upon receipt of D1's appeal against EOT1, DW7 said that D2 had reviewed the number of days it had granted in EOT1 and the documents submitted by D1 to support the appeal. DW7 said that D2 had also assessed ZNA's recommendation in its 31 July 2015 letter and found that ZNA's reasoning as to why the completion date should be extended and additional extension of time should be given, to take into account the lowering of the PUO drain and the construction of the STP, was justified.

[96] DW7 said that upon considering ZNA's recommendation and D2's review and assessment of the documents submitted by D1 to support the appeal, D2 issued EOT3 and extended the completion date for Phase 1 of the project for 205 days from the original completion date of 13 October 2014 to 5 May 2015.

[97] Learned counsel for the plaintiff did not challenge DW6 of ZNA and DW7's evidence during his cross-examination of them. The plaintiff's counsel only asked them brief questions on the supporting documents provided by D1 for the application of EOT3. The rule in *Brown v. Dunn*, therefore, applies – the plaintiff is taken to have accepted DW6 and DW7's evidence as regards ZNA's recommendation and D2's review of its earlier decision and the granting of EOT3.

[98] For these reasons, this court finds that D2 and D3 had proved their case that D2 had conducted a fair and reasonable assessment of D1's application for EOT3 and in granting EOT 3 in the circumstances.

[99] Accordingly, this court finds that EOT3 was granted in accordance with cl. 23.10 of PAM 2006.

Was EOT2 Granted In Accordance With The PAM 2006?

[100] EOT2 was granted by D2 for Phase 2 of the project. The original completion date for Phase 2 of the project was on 12 February 2015.

[101] ZNA through Engineer's Instruction No. 1 dated 24 January 2014 ("EI No. 1 (Phase 2)") instructed D1 to conduct additional work of 128 numbers of Mackintosh Probe Test at designated locations at Phase 2 of the project per the sketch attached to the said engineer's instruction. D1 claimed that, however, it only received the first revised construction drawing from the plaintiff on 17 April 2014 and could only commence work after receiving the drawing.

[102] In its letter dated 10 February 2015 to D2, D1 had applied for an extension of time of 95 days for the completion date of Phase 2 of the project ("application for EOT2") (marked as "D3"). It included the EI No. 1 (Phase 2), the RFI and related documents in the application.

[103] Under cross-examination, DW1 testified that the ZNA wanted the Mackintosh Probe test to assess the ground condition to redesign the foundation for Phase 2 of the project. He said, "if you don't have a foundation, you don't have a house at all". When I asked DW6 during the trial why ZNA wanted the Mackintosh Probe test done, DW6 replied that ZNA needed the test done because it wanted to know the soil condition – "to know the strength of the soil in the area."

[104] Based on the recommendation of ZNA and upon considering the supporting documents submitted by D1 in the application for EOT2, D2 granted EOT2 for a period of 36 days to extend the completion date of Phase 2 to 20 March 2015 (see bundle B1/p. 46). The reasons stated on the EOT2 for the extension of time were the two delaying events *ie*, (i) additional work for Mackintosh Probe; and (ii) awaiting new design from ZNA. DW7 testified that D2 found that the two delaying events were relevant events under cl. 23.8(m) of PAM 2006 and, for this reason, granted EOT2 to extend the completion date from 12 February 2015 to 20 March 2015.

[105] However, D2 only granted EOT2 for 36 days and not 95 days, as requested by D1 in its application. In his witness statement, DW7 stated that D2 agreed with ZNA's recommendation that the new completion date should be 31 March 2015 *ie*, 36 days from 23 February 2015, to be a fair and reasonable EOT. DW7 said that D2 agreed with ZNA that the new start date should be 17 April 2014 and not 21 April 2014 as claimed by D1 since D1 had received the drawings on 17 April 2014; and that D1 took too long to submit the second batch of the Mackintosh Probe test result – D1 had submitted the first batch of the test result on 14 February 2014 but only submitted the second batch on 31 March 2014.

[106] Learned counsel for the plaintiff did not challenge DW7's answers in his witness statement regarding the reason why D2 had granted 36 days for EOT2.

[107] Accordingly, the plaintiff is deemed to have accepted the grounds that D2 had granted EOT2.

Findings Of Court On Issue (i)

[108] For the reasons above, this court finds that D2 had fairly and reasonably assessed D1's application for EOTs and that it had granted EOT1, EOT2 and EOT3 on fair and reasonable grounds in the circumstances.

[109] The plaintiff's counsel failure to challenge the defendants' witnesses on the part of their testimony as regards the granting of the EOTs during cross-examination is damning on the plaintiff's case. The rule in *Brown v. Dunn*, which has been applied by our courts (for *eg*, the Federal Court in *Shamim Reza Abdul Samad v. PP* and the Court of Appeal in *Aik Ming*), stipulates that where a party fails to challenge the testimony of a witness

during cross-examination, that party is deemed to accept that part of the witness's evidence. The rule is explained by the Federal Court in *Wong Swee Chin v. PP* [1980] CLJU 138; [1980] 1 LNS 138; [1981] 1 MLJ 212, as follows:

> On this point we need only say there is a general rule that failure to crossexamine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony.

[110] Pursuant to s. 101 of the Evidence Act 1950, the plaintiff, as the person who desires for this court to give it judgment against the defendants in this suit, must prove the facts it asserts exist. Section 102 of the Evidence Act stipulates that the burden of proof in a suit lies on the person who would fail if no evidence at all were given on either side. And under s. 103 of the Evidence Act, the burden of proof as to any particular fact lies on the person who wishes this court to believe of its existence. The Federal Court in *International Times & Ors v. Leong Ho Yuen* [1980] CLJU 31; [1980] 1 LNS 31; [1980] 2 MLJ 86 held:

> According to section 102 and 103 of the Evidence Act, if the party with whom this onus lies whether initially or subsequently as a result of its shifting does not give any or further evidence or gives evidence which is not sufficient, such party must fail.

[111] In this instant case, the plaintiff did not adduce any evidence to discharge its burden of proof that D1 had failed to comply with the condition precedent in making its application for EOT1. It also failed to adduce any evidence to prove that D2 had granted EOT1, EOT2 and EOT3 without justification and/or in breach of the PAM 2006.

[112] For all the above reasons, this court finds that D1 had applied for EOT1, EOT2 and EOT3 in accordance with PAM 2006 and that D2 had granted EOT1, EOT2, and EOT3 in accordance with PAM 2006.

Issue (ii): Did D2 And/Or D3 Conspire With D1 And ZNA To Approve D1's Applications For The EOTs Without Justification And/Or In Breach Of The PAM 2006?

[113] The plaintiff pleaded that D2 and/or D3 had conspired with D1 and ZNA to approve D1's applications for the EOTs without justification and/or in breach of PAM 2006.

[114] Pursuant to the principles of the tort of conspiracy, in order to prove that D2 and/or D3 had conspired with D1 and ZNA, the plaintiff must prove the following: (i) a conspiratorial agreement between the defendants and ZNA for D2 to approve D1's applications for the EOTs in breach of the PAM 2006; (ii) the purpose of the agreement was to injure the plaintiff; and (iii) the agreement was executed by the defendants and ZNA, which resulted in damages to the plaintiff.

[115] The Court of Appeal in *SCK Group Bhd & Anor v. Sunny Liew Siew Pang & Anor* [2010] 9 CLJ 389; [2011] 4 MLJ 393, held that:

> [14] *The tort of conspiracy is not constituted by the conspiratorial agreement alone. For conspiracy to take place, there must also be an unlawful object, or, if not in itself unlawful, it must be brought about by unlawful means:* see *Davies v. Thomas* [1920] 2 Ch 189 per Warrington LJ, and *Seah Siang Mong v. Ong Ban Chai & Another Case* [1998] 1 CLJ Supp 295 (HC) per Ghazali J (now FCJ). *There must be a co-existence of an agreement with an overt act causing damage to the plaintiffs. Hence, this tort is complete only if the agreement is carried into effect, thereby causing damage to the plaintiffs.* In order to succeed in a claim based on the tort of conspiracy, the plaintiffs must establish:
>
> (a) an agreement between two or more persons;
>
> (b) for the purpose of injuring the plaintiff; and
>
> (c) acts done in the execution of that agreement resulted in damage to the plaintiff: *Marrinan v. Vibart* [1962] 1 All ER 869 at p 871 per Salmon J; and *Halsbury's Laws of England* (4th Ed) Vol 45 at p 271, as applied by Ghazali J (now FCJ) in Seah Siang Mong.
>
> (emphasis added)

[116] Despite making the very serious allegation of conspiracy against the defendants and ZNA, the plaintiff did not adduce any evidence at all to prove the requisite elements of the tort of conspiracy. No evidence was produced during the trial to show that there was an agreement between the defendants and ZNA for D2 to grant the EOTs without justification and/or in breach of the PAM 2006. Without such an agreement, there cannot be a conspiracy between the parties to commit an overt act to cause damage to the plaintiff. In the words of the Court of Appeal in *SCK Group*, the plaintiff in this instant case failed to prove "the co-existence of an agreement with an overt act causing damage to the plaintiff".

[117] Accordingly, the plaintiff failed to prove its allegation of the tort of conspiracy between D2 and D3 with D1 and ZNA for D2 to grant the EOTs to D1 without justification and/or in breach of the PAM 2006.

[118] In *Hong Yik Trading v. Liziz Plantation Sdn Bhd* [2017] 8 CLJ 491; [2017] 5 MLJ 398, FC, Arifin Zakaria CJ said:

> [12] It is settled law that the burden of proof rests throughout the trial on the party who asserts that the facts exist (s. 101 of the Evidence Act 1950). Where a party on whom the burden of proof lies has discharged that burden, then the evidential burden shifts to the other party. However, if the party on whom the burden of proof lies fails to discharge it, the other party need not call any evidence.

[119] It follows, therefore, as the plaintiff failed to discharge its burden of proof of the alleged conspiracy between D2 and/or D3 with D1 and ZNA in the grant of the EOTs without justification and/or in breach of the PAM 2006, the defendants do not have to call any evidence to disprove the allegation.

Findings Of Court On Issue (ii)

[120] By reason of the plaintiff's failure to discharge its burden of proving the tort of conspiracy against the defendants, this court finds that D2 and/or D3 did not conspire with D1 and ZNA to approve D1's applications for the EOTs without justification and/or in breach of the PAM 2006.

Issue (iii): Is The Plaintiff Entitled To RM3,198,102 Being Damages For LAD?

[121] In para. 25(v) of its amended statement of claim, the plaintiff pleaded that it had suffered loss and damage for LAD in the sum of RM1,050,920 as a result of the grant of EO1 and the sum of RM2,154,386 as a result of the grant of EO3. However, the plaintiff did not plead any particulars in its amended statement of claim as to how the amount of RM3,198,102 of LAD was calculated.

[122] Pursuant to ss. 101 and 102 of the Evidence Act 1950, the plaintiff has the burden of proving (i) that the grant of EOT1 and EOT3 were wrong, (ii) it had suffered damages as a result of the alleged wrong, and (iii) the amount of damages it had suffered as a result.

[123] The plaintiff has failed to prove that the grant of the EOT1 and EOT3 were wrong. For the reasons above, this court has found that D1's applications for EOT1 and EOT3 were fairly and reasonably assessed by D2 and were validly and properly granted by D2 to D1 in accordance with the PAM 2006. Accordingly, the plaintiff is not entitled to any loss and/or damages for LAD resulting from the issuance of EOT1 and EOT3.

[124] The plaintiff also did not provide any particulars as to how the sum of RM3,198,102 of LAD was calculated. In addition, it did not produce any evidence to prove the amount of LAD that it claimed to have paid as a result of the issuance of EOT1 and EOT3.

[125] PW1, the plaintiff's main witness, did not give any particulars of the damages claimed by the plaintiff. He did not state how much, if any, LAD that it had paid to the purchasers of the houses in Phase 1 of the project. He admitted under cross-examination that the plaintiff did not produce any documents in court to support its claim that it had paid LAD in the sum of RM3,198,102 to the purchasers.

[126] It is settled law that the plaintiff must prove the loss it claims. As Lord Goddard remarked in *Bonham Carter v. Hyde Park Hotel* 64 TLR 177, "It is not enough for the plaintiff to just write the figures and throw them at the court" – quoted by the Federal Court in *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777; [1995] 1 AMR 41; [1995] 1 CLJ 15.

Findings Of Court On Issue (iii)

[127] For these reasons, this court finds that the plaintiff has failed to discharge its burden of proof as regard its claim of the sum of RM3,198,102.

[128] Accordingly, the plaintiff is not entitled to the sum of RM3,198,102 claimed.

Issue (iv): D1's Counterclaim – Does The Plaintiff Owe D1 The Sum Of RM3,141,706.82?

[129] D1's counterclaim against the plaintiff is in the sum of RM3,141,706.82 being the balance payment due to D1 from the plaintiff for work done by D1 for the project.

[130] D1's counterclaim is based on the COIPP issued by D2 to the plaintiff and copied to D1. D2 had issued 22 COIPPs and the last COIPP was COIPP No. 22 dated 23 April 2018, which was received by D1 on 1 November 2018. The amount certified in COIPP No. 22 was as follows:

Nett valuation:	RM45,989, 147.69
Less: Previous Payment:	(RM44,955,400.00)
Amount due for Payment:	RM1,033,747.69

[131] D1 claims that the previous payment stated in COIPP No. 22 was incorrect. The actual amount paid to D1 was the RM43,421,334.03, not RM44,955,400. DW1 testified that D1's records show that the plaintiff paid RM43,421,334.03 to D1, and not RM44,955,400.

[132] DW3, who is D1's quantity surveyor, gave an in-depth and through explanation of the counterclaim in his witness statement. He referred to the COIPPs issued by D2, and the documentary evidence of payment made by the plaintiff to D1. DW3 also showed the computation for D1's counterclaim.

[133] D1 pleads that for this reason the amount to be paid by the plaintiff to D1 is RM3,141,706.82. The calculation for the amount owing is below:

Nett valuation (as on COIPP No. 22):	RM45,989, 147.69
Less: Previous Payment Made:	(RM43,421,334.00)
Amount not paid:	RM2,567,813.66
Interest on late payment:	RM573,893.16
Amount due for payment:	RM3,141,706.82

[134] The plaintiff did not challenge the validity of the COIPP No. 22 issued by D2. Its refusal to pay the payment due is premised on its claim that the EOTs granted were null and void. In para. 50D of its defence, the plaintiff pleaded that D1 had refused, failed and/or was negligent in its duty and responsibility as the contractor for the project. PW1, in his supplemental witness statement, stated that the plaintiff is of the view that the counterclaim is not payable because of the invalid EOTs granted by D2 to D1.

[135] It is a fundamental principle of construction law that the employer must pay the contractor for the construction works under a contract between them. Hence, the plaintiff is obliged to pay D1 for the works done by D1 for the construction of the project. In their book *Construction Law in Malaysia* 2013, Thomson Reuters, Sundra Rajoo and Harbans Singh stated on pp. 276 and 277:

> *…, the employer is under a positive obligation to pay the contractor the agreed consideration (ie, the contract sum) in accordance with the terms of the particular contract involved; failure to do so constituting a breach of contract on his part with its consequential ramifications.*
>
> …
>
> … most, if not all, standard forms of conditions of contract used in this country incorporate elaborately detailed stipulations *vis-à-vis* the employer's obligation to pay and the contractor's right to payment. Notable examples of these include clause 30.0 of the PAM Contract 2006 (With Quantities) … (emphasis added)

[136] The contract in the letter of award between the plaintiff and D1 was governed by the PAM 2006. Clause 30.1 of PAM 2006 states that the employer is obliged to pay the amount certified in the COIPP within the "Period of Honouring Certificates". Paragraph 10.2 of the letter of award states that "The Period of Honouring Certificate shall be 30 working days from the date of certificate from the architect." Therefore, the plaintiff must pay D1 the amount on each COIPP within 30 working days from each of the said COIPPs.

[137] The evidence shows that the plaintiff has not paid D1 the amount certified in the COIPP No. 22 and that it has not paid all the sum certified under some of the earlier COIPPs. The unpaid amounts were detailed by DW1 and DW3 in their testimonies.

[138] Learned counsel for the plaintiff did not challenge either DW1 or DW3 during his cross-examination of both these witnesses on their evidence regarding the amount the plaintiff owes to D1 under the COIPPs. Therefore, the plaintiff is deemed to have accepted D1's evidence that the plaintiff owes D1 payment in the sum of RM3,141,706.82: see *Brown v. Dunn; Aik Ming* (*supra*); *Wong Swee Chin v. PP* (*supra*). Learned counsel for the plaintiff also did not make any submissions regarding D1's counterclaim in the plaintiff's written submissions filed in this court after the trial of this suit.

[139] Furthermore, PW1, under cross-examination by D1's counsel, admitted that the plaintiff had not made all the payments under the COIPPs to D1.

Findings Of Court On Issue (iv)

[140] For these reasons, this court finds that D1 successfully discharged its burden of proof that the plaintiff owes it the sum of RM3,141,706.82 being the balance of payment for the construction work done by D1 for the project.

A

Decision

[141] For the reasons above, with respect to the plaintiff's claim, this court finds that the plaintiff failed to discharge its burden of proof against the defendants. Accordingly, the plaintiff's actions against D1, D2 and D3 are dismissed.

B

[142] With respect to D1's counterclaim against the plaintiff, this court finds that D1 had discharged its burden of proof against the plaintiff. Therefore, judgment is given to D1 in the sum of RM3,141,706.82 against the plaintiff.

[143] The plaintiff is hereby ordered to pay to D1

C

(i) the sum of RM3,141,706.62; and

(ii) interest at the rate of 7.85% per annum on the sum of RM3,141,706.62 from 2 November 2018 until the date of full settlement.

[144] The plaintiff is ordered to pay D1 costs in the sum of RM100,000; and

D

to pay D2 and D3 together costs in the sum of RM100,000, subject to the allocatur fee.

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